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In the Supreme Court of the United States

No. 73-307

EDWARD Q. LUPIA, individually and for and on behalf, pursuant to Rule 23 of the Federal Rules of Civil Procedure, of other distributors of Stella D'Oro Biscuit Co., Inc., a New York corporation, similarly situated, as a class,

Petitioner,

vs.

STELLA D'ORO BISCUIT CO., INC., a New York corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the United States District Court for the Northern District of Illinois and the United States Court of Appeals for the Seventh Circuit are unreported, but are set forth in full in Appendix A and B of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES AND RULES INVOLVED

The pertinent provisions of the United States Code, the United States Supreme Court Rules, and the Federal Rules of Civil Procedure are set forth as follows:

United States Code:

28 U.S.C. § 1291 (p. 4 of Petition)

28 U.S.C. § 1292 (Appendix A to this responsive brief)

28 U.S.C. § 1651 (p. 5 of Petition)

United States Supreme Court Rules:

Rule 19 (Appendix B to this responsive brief)

Federal Rules of Civil Procedure:

Rule 23 (pp. 5-6 of Petition)

Federal Rules of Appellate Procedure:

Rule 21 (Appendix C to this responsive brief)

ISSUES PRESENTED

1. May a plaintiff, having an individual claim in excess of $700,000, appeal pursuant to 28 U.S.C. §1291 from an interlocutory order denying plaintiff's motion that the action be confirmed as a class action and dismissing the class action count from the complaint.

2. Must an appellate court take jurisdiction pursuant to 28 U.S.C. §1651 by treating a notice of appeal as a petition for mandamus from an interlocutory order when the requisites of Rule 21 of the Federal Rules of Appellate Procedure have not been met, no abuse of discretion or usurpation of power by the district judge is alleged and an appeal is available pursuant to 28 U.S.C. 1292(b).

STATEMENT OF THE CASE

This action was commenced by a Complaint brought in the name of Petitioner, Edward Q. Lupia, individually and for and on behalf of other distributors of Stella D'Oro Biscuit Co., Inc., similarly situated as a class, pursuant to Rule 23 of the Federal Rules of Civil Procedure. The Complaint consists of five counts. Counts I through IV describe separate alleged violations by Respondent of the Federal Antitrust Laws and seek treble damages therefor in the aggregate amount of $702,523.37 on behalf of the Petitioner, individually. Count V realleges Counts I through IV as a class action on behalf of all present and former distributors of Respondent, stating no specific dollar amount of damages.

Petitioner moved in the district court that the case be confirmed and proceed as a class action, pursuant to Rule 23 of the Federal Rules of Civil Procedure. Respondent, *inter alia,* moved to dismiss the Complaint on the ground of improper venue and lack of *in personam* jurisdiction, or, in the alternative, to transfer the action to the United States District Court for the Southern District of New York. On the basis of the motions, briefs and arguments filed with the district court, the court ruled on November 2, 1972, in a memorandum decision, *inter alia,* that:

> "Plaintiff's [Petitioner's] motion that the cause be confirmed as a class action is denied and Count V of his Complaint which separately asserts the class action allegations, is therefor dismissed. Defendant's [Respondent's] motions to dismiss are denied and the rule to show cause is discharged, in accordance with the views expressed above." (Appendix B to Petition at p. 12(b))

On November 15, 1972, Petitioner filed a notice of appeal to the district court's dismissal of its class action. Petitioner did not seek to have the ruling determined as final pursuant to Rule 54(b) of the Federal Rules of Civil Procedure or request certification pursuant to 28 U.S.C. §1292(b). Instead, Petitioner claimed that he had an absolute right to appeal the order on the grounds that it was a "final and appealable order within the purview of 28 U.S.C. §1291." Respondent moved to dismiss the appeal on the ground that the Court of Appeals did not have jurisdiction over the subject matter pursuant to 28 U.S.C. §1291. On May 18, 1973, the United States Court of Appeals for the Seventh Circuit dismissed said appeal for want of jurisdiction on the ground that the order appealed from was not an appealable order. In so holding, the Court of Appeals stated: "If the interlocutory appeals route of 28 U.S.C. §1292(b) had been successfully followed, review would be available. [citations omitted]." (Appendix A to Petition at p. 2(a))

STATEMENT OF FACTS

Petitioner's statement of facts is substantially one-sided and relates more to the merits of the Complaint than to the issues presented by the Petition. A more accurate treatment of the facts is found in the opinion of the District Court. (Appendix B to Petition)

ARGUMENT

I.

THE PETITION FOR CERTIORARI SHOULD BE DENIED SINCE NO GROUND EXISTS FOR THE GRANTING OF THE WRIT.

The exercise of certiorari jurisdiction has been a frequent subject of scholarly debate and pronouncements of this Court and its justices. In *Magnum Co.* v. *Coty*, 262 U.S. 159, 163 (1923), Chief Justice Taft, in much quoted language, stated:

> "The jurisdiction [of the Supreme Court to review cases by certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that eighty per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

The Petition in the instant case falls within the category of cases referred to by Chief Justice Taft as outside the scope of Supreme Court review. The Petition does not even approach the standards for certiorari jurisdiction enumerated by this Court and by Supreme Court Rule 19. Supreme Court Rule 19 in its pertinent part provides:

> "Rule 19. Considerations governing review on certiorari.
>
> 1. A review on writ of certiorari is not a matter of right, but of sound discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling or

fully measuring the court's discretion, indicate the character of reasons which will be considered:

* * *

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; . . . or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; . . ."

Petitioner seeks to bring its petition within the foregoing considerations set forth in Rule 19(b). Upon review of the applicable law, it is clear that these considerations are absent.

A. The Courts Of Appeal Have Uniformly Held That An Order Denying The Maintenance Of An Action As A Class Action Is Interlocutory And Not Appealable Under The Circumstances Of This Case.

Appeals to the Courts of Appeal are governed by 28 U.S.C. §§ 1291 and 1292. Section 1291 provides in part that:

> "The Courts of Appeal shall have jurisdiction of appeals to all *final decisions* of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." (emphasis added)

This section prevents appeals from any decision which is tentative, informal or incomplete as long as the case at bar remains open, unfinished or inconclusive. The purpose of the statute is to combine into one proceeding all the matters that may effectively be reviewed if and when final judgment occurs so as to avoid piece-meal appeals *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176 (1955).

Petitioner in the instant case claims that he has an absolute right under 28 U.S.C. § 1291 to appeal an order dismissing the class action even though he is left with an individual pending claim in excess of $700,000. Each of the numerous Courts of Appeal which have considered the question has held that a district court's interim order determining that an action may not be maintained as a class action is not a final and appealable order, at least where plaintiff is left with a substantial individual claim, *Gosa* v. *Securities Investment Company,* 449 F.2d 1330 (5th Cir. 1971), *Caceres* v. *Int'l Air Transport Ass'n.,* 422 F.2d 141 (2d Cir. 1970); *Milburg* v. *Western Pacific Railroad Company,* 443 F.2d 1301 (2d Cir. 1971); *City of New York* v. *Int'l Pipe and Ceramics Corp.,* 410 F.2d 295 (2d Cir. 1969); *Weingartner* v. *Union Oil of California,* 431 F.2d 26 (9th Cir. 1970); *Hackett* v. *General Host Corporation,* 455 F.2d 618 (3rd Cir.) *cert. denied* 407 U.S. 925 (1972); *Jumps* v. *Leverone,* 150 F.2d 876 (7th Cir. 1945); *Lipsett* v. *United States,* 359 F.2d 956 (2d Cir. 1966). In no decision cited by Petitioner or found by Respondent has it been suggested that a class action denial may be directly appealed under such circumstances.

A narrow exception to the final judgment rule has been carved by some Circuits for cases in which a plaintiff's individual claim is so small that denial of his class action appeal would signal the "death knell" of the litigation.[1] Other Circuits reject this exception and hold that a denial of a class action is not appealable under any circumstances.

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[1] $70 claim, *Eisen* v. *Carlisle & Jacquelin,* 370 F.2d 119 (2d Cir. 1966) *cert. denied,* 386 U.S. 1035 (1967); $1,000 claim, *Green* v. *Wolf Corp.,* 406 F.2d 291 (2d Cir. 1968) *cert. denied,* 395 U.S. 977 (1969); *contra* where plaintiff had $150,000 claim; *Caceres* v. *Int'l Air Aransport Ass'n.,* 422 F.2d 141 (2d Cir. 1970).

e.g. Hackett v. *General Host Corporation,* 455 F.2d 618 (3rd Cir.) *cert. denied* 407 U.S. 925 (1972). It should be noted that any judicial doubts expressed about the death knell rule have been in favor of narrowing or eliminating the exception, *not* toward broadening the right to appeal.

Petitioner has seized upon this exception in a clever attempt to manufacture a disagreement among the Courts of Appeal on the issues of the instant case. As Petitioner well knows, however, the Courts of Appeal are unanimous in denying such appeals where, as in this case, the plaintiff is left with a substantial individual claim, and no disagreement exists among the Circuits in either ruling or philosophy. *Gosa* v. *Securities Investment Company,* 449 F.2d 1330 (5th Cir. 1971); *Caceres* v. *Int'l Air Transport Ass'n.,* 422 F.2d 141 (2d Cir. 1970); *Milburg* v. *Western Pacific Railroad Company,* 443 F.2d 1301 (2d Cir. 1971); *City of New York* v. *Int'l Pipe and Ceramics Corp.,* 410 F.2d 295 (2d Cir. 1969); *Weingartner* v. *Union Oil of California,* 431 F.2d 26 (9th Cir. 1970); *Hackett* v. *General Host Corporation,* 455 F.2d 618 (3rd Cir.), *cert. denied* 407 U.S. 925 (1972); *Jumps* v. *Leverone,* 150 F.2d 876 (7th Cir. 1945); *Lipsett* v. *United States,* 359 F.2d 956 (2d Cir. 1956).

B. The Decision Of The Court Of Appeals Is In Conformity With The Applicable Decisions Of This Court And With Federal Statutes.

Faced with this considerable legal precedent directly on point, Petitioner attempts to justify his claim of absolute right to appeal by invoking the "collateral order" doctrine of *Cohen* v. *Industrial Beneficial Loan Corp.,* 337 U.S. 541 (1949). The *Cohen* case fashioned an exception to the finality rule for those cases where an interlocutory order, not otherwise appealable, is a final disposition of a claimed

right which was not an ingredient of the cause of action and did not require consideration with it, provided, however, that there exists an imminent need to resolve that issue lest the interests of justice be so deferred that without immediate appeal, the rights of the individual litigants will be severely prejudiced.

The *Cohen* doctrine has time and again been rejected as a basis for allowing appeal from an order denying a class action under the circumstances of our case. *Hackett* v. *General Host Corporation,* 455 F.2d 618 (3rd Cir.) *cert. denied* 407 U.S. 925 (1972); *Weingartner* v. *Union Oil Co. of California,* 431 F.2d 26 (9th Cir. 1970); *Caceres* v. *Int'l Air Transport Ass'n.,* 422 Fed. 141 (2nd Cir. 1971); *City of New York* v. *Int'l Pipe and Ceramics Corp.,* 410 F.2d 295 (2d Cir. 1969). An order refusing to permit a class action to proceed is not "collateral" in the sense demanded by the *Cohen* doctrine. See *Weingartner* and *Int'l Pipe and Ceramics Corp., supra.* Nor is such an interim order "final" and rights "irreparably lost" as required by the *Cohen* doctrine. Plaintiff's substantial claim will enable him to continue his action. Further, the order may be altered or amended by the district court at any time during the proceeding pursuant to Rule 23 (c) (1), *Caceres* and *Int'l Pipe and Ceramics Corp., supra.*[2]

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[2] Rule 23(c)(1) provides:

> As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be maintained. An order under this subdivision may be conditional, *and may be altered or amended before the decision on the merits.* (emphasis added)

The second sentence clearly indicates that the drafters of the rule did not intend such an order to be final and immediately appealable. *Caceres* v. *Int'l Air Transport Ass'n., supra,* 422 F.2d at p. 144, n. 6.

The *Cohen* doctrine is particularly inapplicable where the question on appeal is, as in our case, the propriety of the district court's exercise of discretion. *Donlon Industries, Inc.* v. *Forte,* 402 F.2d 935 (2d Cir. 1968); *Weight Watchers of Philadelphia, Inc.* v. *Weight Watchers Int'l,* 455 F.2d 770 (2d Cir. 1972). *City of New York* v. *Int'l Pipe and Ceramics Corp.,* 410 F.2d 295 (2d Cir. 1969); *Jumps* v. *Leverone,* 150 F.2d 876 (7th Cir. 1945). As Judge Friendly said in *Weight Watchers, supra* 455 F.2d at p. 773, an important factor bearing on the application of the *Cohen* doctrine

> "[i]s whether a decision will settle a point once and for all, as it did in the *Cohen* case, or will open the way for a flood of appeals concerning the propriety of a district court's ruling on the facts of a particular suit."

Every interim order concerning the propriety of a class action under Rule 23 requires a careful review of the facts of the particular case. The trial judge must be and is allowed wide discretion in shaping his interim order to meet the facts of that particular case. Except in the case of flagrant abuse, such interim discretionary orders are not appealable. *City of New York* v. *Int'l Pipe and Ceramics Corp., supra; Jumps* v. *Leverone, supra.* To hold otherwise would be to open the courts to a flood of interim appeals concerning the district court's discretionary ruling on the facts of a particular suit at a time when the federal courts are being overwhelmed by an unprecedented number of appeals. *Hackett* v. *General Host Corporation,* 455 F. 2d 618 (3rd Cir.) *cert. denied* 407 U.S. 925 (1972); *Korn* v. *Franchard,* 443 F.2d 1301 (2d Cir. 1971).

The *Cohen* ruling emerged at a time when no alternative interlocutory appellate routes were available. Present modifications to the Judicial Code and the Federal Rules

of Civil Procedure were not yet enacted. The passage of the Interlocutory Appeals Act of 1958, which added § 1292(b) to the Judicial Code, and the 1963 amendment to Rule 54(b) provide a litigant with new means of appealing an adverse interlocutory order. In light of the statutory changes and the amendments to the Federal Rules of Civil Procedure, numerous Courts of Appeal have been reluctant to extend the *Cohen* doctrine. *New England Power Co.* v. *Asiatic Petroleum Corp.*, 456 F.2d 183 (1st Cir. 1972); *Allegheny Airlines, Inc.* v. *LeMay*, 448 F.2d 1341 (7th Cir. 1971); *Hartford Fire Ins. Co.* v. *Herrald*, 434 F.2d 638 (9th Cir. 1970); *Borden Co.* v. *Sylk*, 410 F.2d 843 (3d Cir. 1969); and *United States* v. *Fried*, 386 F.2d 691 (2d Cir. 1967). See also Professor Moore's stern warning against any extension of the *Cohen* doctrine in view of the available alternative appellate remedies. *9 Moore's Fed. Pract.* § 110.10 at pp. 135-6 and § 110.26 at p. 286. (2d ed. 1972)

Alternative appellate remedies are now more than adequate to take care of those isolated instances that merit appeal. *Hackett* v. *General Host Corporation*, 455 F.2d 618 (3rd Cir.) *cert. denied* 407 U.S. 925 (1972). The Judicial Code § 1292(b) provides for appeal where the district court certifies that the issue is a serious and unsettled question which will materially advance the litigation. Rule 54(b) of the Federal Rules of Civil Procedure allows the district court to certify as final and appealable an order that finally determines fewer than all the claims or a claim with respect to fewer than all the parties. Finally, the Petitioner may seek review by petitioning for mandamus alleging an abuse of discretion if the district judge refuses to certify the issue pursuant to the aforementioned rules.

Petitioner has made no attempt in this case to obtain district court certification pursuant to § 1292(b) or Rule

54(b). Petitioner complains, at page 25 of his petition, that he should not have to follow the route of application for certification to the district court which in the first instance denied his class action. But as the court in *Hackett* v. *General Host Corporation, supra,* pointed out 455 F.2d at p. 624:

> "We have had no indication that the district courts of this Circuit will reject applications under § 1292(b) or Rule 54(b), arbitrarily or in disregard of the policy considerations favoring, where feasible, consumer class actions warranted by federal statutes. If in isolated instances arbitrariness creeps in, there remains the ultimate remedy of mandamus."

Petitioner further complains at page 25 of his petition that certification requires the litigant to pass two barriers to judicial review "with no assurance that he will be able to obtain such review." That is certainly true. Limiting review to those situations that *merit* review is a salutary purpose of the appellate system and the very crux of these appellate remedies.

Disappointed class applicants should not be permitted to clog court dockets by merely filing a notice of appeal from interim district court orders under § 1291. If their case merits appeal, they should be required to proceed by one of the two alternative routes, 28 U.S.C. § 1292(b) or Rule 54(b) of the Federal Rules of Civil Procedure. These procedures permit the judiciary to exercise some discretion in the allowance of appeals, rather than leaving the matter entirely to the whim of disappointed class applicants. A blanket rule permitting an absolute right of appeal under § 1291 from an order denying a class action is not in the best interests of the fair and efficient administration of justice.

II.

THERE WAS NO BASIS IN LAW OR IN EQUITY FOR GRANTING A WRIT OF MANDAMUS.

Petitioner claims, in the alternative, that the Court of Appeals erred in not treating Petitioner's notice of appeal and brief as a Petition for Mandamus under 28 U.S.C. §1651. Petitioner at no time filed a formal petition for mandamus or named or served the Honorable PHILIP W. TONE, district judge, as a party to the appeal pursuant to Rule 21 of the Federal Rules of Appellate Procedure. Petitioner has not claimed that the district judge abused his discretion or that the judge was without power to rule, the critical allegation to any petition for mandamus. *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249 (1957); *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964); and *Will* v. *United States*, 389 U.S. 90 (1967).

Petitioner is attempting to invoke the extraordinary writ powers of the federal appellate courts as an alternative to 28 U.S.C. 1292(b). However, mandamus will lie only if no other avenue of relief is available. As suggested by the opinion of the Court of Appeals in this case and as supported by that court's holding in *Allegheny Airlines, Inc.* v. *LeMay*, 448 F.2d 1341 (7th Cir. 1971), a certificate pursuant to 28 U.S.C. §1292(b) should first be sought before resort is had to mandamus as a method of review. See 9 *Moore's Federal Practice*, ¶110.22[5], pp. 267-268; ¶¶110.26-110.30, pp. 275-320 (2d ed., 1972) and cases cited therein.

Petitioner has cited no authority in support of his position that his notice of appeal from an order denying his motion to affirm the action as a class action should be

treated by the Court of Appeals as a Petition for Mandamus. In fact the only authority on that issue is against Petitioner. The district court's nonarbitrary exercise of discretion in issuing an interim order under Rule 23 of the Federal Rules of Civil Procedure is not subject to review by petition for mandamus. *Hackett* v. *General Host Corporation,* 455 F.2d 618 (3d Cir.) *cert. denied,* 407 U.S. 925 (1972); *Weight Watchers of Phil.* v. *Weight Watchers Int'l.,* 455 F.2d 770 (2d Cir. 1972).

CONCLUSION

Petitioner fails to show any proper ground for the granting of certiorari in the instant case. For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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